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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Jose Luna, individually, and on behalf of those similarly situated,

CASE NO.

CLASS ACTION COMPLAINT

Demand for Jury Trial

Plaintiff,

V.

Brad's Raw Chips, LLC,

Defendant.

INTRODUCTION

1. Plaintiff Jose Luna, by and through his counsel, brings this class action against Defendant Brad's Raw Chips, LLC ("Defendant") to seek redress for its unlawful and deceptive practices in labeling and marketing the BRADS PLANT BASED crunchy kale, veggie chips, veggie flats, and other products, which make protein claims on the front of the product packages while omitting a statement of the corrected amount of protein from the Nutrition Facts Panel ("NFP").

2. Consumers are increasingly health conscious and, as a result, many consumers seek foods with protein. To capitalize on this trend, Defendant prominently labels its Products¹ as providing specific amounts of protein depending on the product, such as “8g PROTEIN PER BAG” on the front label of its Crunchy Kale (Naked). Consumers, in turn, reasonably expect that each product will actually provide the amount of protein per bag claimed on the front of the product package in a form the body can use.

3. The Food and Drug Administration prohibits such front label claims about the amount of protein unless manufacturers also provide additional information in the nutrition fact panel about how much of the recommended daily value for protein that the product will actually provide. 21 C.F.R. §§ 101.9(c)(7)(i), 101.13(b), (n). That is because the FDA recognizes that (1) when manufacturers tout an amount of protein on the front label, that amount is likely to be material to purchasing decisions, even though reasonable consumers may not know the total amount of protein they need to ingest on a daily basis, and (2) not all proteins are the same in their ability to meet human nutritional requirements, so a simple statement

¹ At the time of this filing, the following food products are included in this definition: Crunchy Kale (Original), Crunchy Kale (Naked), Crunchy Kale (Radical Ranch), Crunchy Kale (Vampire Killer), Crunchy Kale (Cheeze It Up), Crunchy Kale (Nachos), Veggie Flats (Sea Salt Cauliflower), Veggie Flats (Everything Zucchini), Veggie Flats (French Onion), Veggie Flats (Rosemary Tomato), Veggie Chips (Broccoli Cheddar), Veggie Chips (Kale), Veggie Chips (Red Bell Pepper), and Veggie Chips (Sweet Potato). This definition is not exhaustive, and shall include all of Defendant's products that are similarly deceptively marketed.

1 about the number of grams does not actually inform consumers about how much
2 usable protein they are receiving. Some proteins are deficient in one or more of the
3 nine amino acids essential to human protein synthesis and/or are not fully digestible
4 within the human gut. When a human body uses up the least prevalent essential
5 amino acid from a food product, protein synthesis shuts down and all of the
6 remaining amino acids from that protein source degrade mostly into waste. Likewise,
7 whatever portion of a protein source is not digestible is similarly unavailable for
8 protein synthesis. A protein's ability to support human nutritional requirements is
9 known as its "quality."

10 4. The FDA required method for measuring protein quality is called the
11 Protein Digestibility Corrected Amino Acid Score ("PDCAAS"). It combines a protein
12 source's amino acid profile and its percent digestibility into a discount factor ranging
13 from 0.0 to 1.0 that, when multiplied by the total protein quantity, shows how much
14 protein in a product is actually available to support human nutritional requirements.
15 The regulations term this the "corrected amount of protein per serving." 21 C.F.R. §
16 101.9(c)(7)(ii). For example, a PDCAAS of .5 means that only half of the protein in
17 that product is actually available to support human protein needs. If the product
18 contained 8 grams total protein per serving, the corrected amount of protein would be
19 only 4 grams per serving. As a result, protein products can vary widely in their ability
20 to support human protein needs—even between two comparator products with the
21 same total protein quantity.

22 5. Because consumers are generally unaware about the usability of various
23 proteins, and may even be unaware of the total amount of usable protein they should
24 ingest each day, the FDA prohibits manufacturers from advertising or promoting
25 their products with a protein claim unless they have satisfied two requirements.
26 First, the manufacturer must calculate the "corrected amount of protein per serving"
27 based on the quality of the product's protein using the PDCAAS method. Second, the
28 manufacturer must use the PDCAAS computation to provide "a statement of the

1 corrected amount of protein per serving” in the nutrition facts panel (“NFP”)
2 “expressed as” a percent daily value (“%DV”) and placed immediately adjacent to the
3 statement of protein quantity. 21 C.F.R. § 101.9(c)(7)(i)-(iii). The %DV is the corrected
4 amount of protein per serving divided by the daily reference value for protein of 50
5 grams. *Id.* Using the same example of a product containing 8 grams total protein per
6 serving with a PDCAAS of .5, the %DV is 8% (4g/50g). Had all of the protein in the
7 product been useful in human nutrition, the %DV would be 16% (8g/50g). The FDA
8 regulations that govern nutrient content claims are also clear that a manufacturer
9 may not make any claims on the front packaging about the amount of protein in the
10 product unless it complies with these two requirements. See 21 C.F.R. § 101.13(b) (“A
11 nutrient content claim[] may not be made on the label...unless the claim is made in
12 accordance with this regulation [i.e., § 101.13]...” and (n) (“[n]utrition labeling in
13 accordance with § 101.8...shall be provided for any food for which a nutrient content
14 claim is made”); accord 58 Fed. Reg. 2302, 23310 (manufacturer can only make a
15 “nutrient content claim...on the label or in labeling of a food, provided that the food
16 bears nutrition labeling that complies with the requirements in proposed § 101.9.”).

17 6. The primary protein sources in Defendant’s Products are kale, sunflower
18 seeds, rice, cashews, buckwheat, pumpkin seeds, flax seeds, sesame seeds, and
19 chickpeas. The PDCAAS score is approximately .11 and .85,² which means
20 Defendant’s products will provide nutritionally less than the protein quantity
21 claimed. Nevertheless, Defendant failed to provide in the NFP a statement of the
22 corrected amount of protein per serving calculated according to the PDCAAS
23 methodology and expressed as a %DV. Accordingly, the protein claims on the front of
24 the package, such as “8G PROTEIN” are unlawful in violation of parallel state and
25

26 ² Monroy Torres, R, *Protein Digestibility of Chia Seed Salvia hispanica L*, REVISTA
27 SALUD PUBLICA Y NUTRICION. 2008, 9:1,
http://www.respyn.uanl.mx/ix/1/articulos/protein_didestibity.htm; Eggum, B.O.,
28 *Chemical composition and protein quality of buckwheat (Fagopyrum esculentum*
Moench), PLANT FOODS FOR HUMAN NUTRITION. 1980, Volume 30, Issue 3-4, pp 175-
179, <http://link.springer.com/article/10.1007/BF01094020>; “True Protein Digestibility
Value of Common Foods.” Federal Register. 1993, Vol. 58, No. 3, 2193-2195.

federal laws because Defendant did not comply with the regulatory requirements for making a protein claim. 21 C.F.R. § 101.9(c)(7)(i), 101.13(b), (n). The failure to include a statement of the corrected amount of protein inside the NFP also rendered the NFP itself unlawful. *Id.* § 101.9(c)(7)(i).

7. In addition to being unlawful under 21 CFR §§ 101.9 and 101.13, Defendant's prominent protein claims on the front of the package while omitting the statement of the corrected amount of protein per serving expressed as a %DV in the NFP, is also likely to mislead reasonable consumers. Consumers reasonably expect that Defendant's products will actually provide nutritionally the full amount of protein per serving claimed on the front of the package and stated in the protein quantity section of the NFP, i.e., that the products contain high quality proteins. But Defendant's products do not do so and instead contain low quality proteins. Had Defendant included a statement of the corrected amount of protein per serving in the NFP, as it was required to do under the law, it would have revealed that the product contains low quality proteins. That information was material to reasonable consumers.

8. Defendant's unlawful and misleading labeling caused Plaintiff and members of the Class to pay a price premium.

PARTIES

9. Plaintiff is a citizen of California, who purchased the Products during the class period, as described herein. The advertising and labeling on the package of the Products purchased by Plaintiff, including the protein representations, is typical of the advertising and labeling of the Products purchased by members of the Class.

- a. In May 2022, Plaintiff purchased Crunchy Kale (Naked) from Whole Foods Market in San Francisco, California.
 - b. Plaintiff made each of his purchases after reading and relying on the truthfulness of Defendant's front labels that promised the Products

1 provided a specific number of grams of protein. For example, he
2 purchased the Crunchy Kale (Naked) relying on the representation of
3 “8G PROTEIN” on the front label. He believed the truth of each
4 representation, i.e., that the product would actually provide the full
5 amount of protein claimed on the front labels in a form human bodies
6 could utilize. He relied on the Products to meet his protein dietary
7 needs. Had Defendant complied with the law and not made the protein
8 claims on the front of its packages, he would not have been drawn to the
9 Products and would not have purchased them. At a minimum, Plaintiff
10 would have paid less for each Product.

- 11 c. Moreover, had Defendant adequately disclosed the corrected amount of
12 protein per serving for each Product expressed as a %DV, as FDA
13 regulations require, Plaintiff would not have purchased the Products or
14 would have, at minimum, paid less for them. Plaintiff regularly checks
15 the NFP before purchasing any product for the first time, including the
16 %DV column for protein when manufacturers provide it, and he uses
17 that information as a basis of comparison between similar products. He
18 looked at and read the NFP on the Crunchy Kale (Naked) before
19 purchasing them for the first time. Manufacturers do not always disclose
20 a %DV for protein, but when they do, he prefers products that provide
21 more of the recommend daily amount of protein (i.e., the one with a
22 higher %DV). When a manufacturer does not provide a %DV for protein,
23 he can only go off of the stated grams of protein, and he assumes that all
24 of those disclosed grams are in a form his body can use as protein.
- 25 d. For example, with the Crunchy Kale (Naked), Plaintiff was looking for a
26 product that would provide 8 grams of useable, i.e., high quality, protein
27 per bag. Had Defendant disclosed that the product provided
28 nutritionally deficient amounts of protein representing less than 16% of

1 the DRV, Plaintiff would have used that information as a basis to
2 compare similar products and would have preferred, instead, to
3 purchase a different product with a higher %DV. At a minimum he
4 would have paid less for Defendant's product. Without the statement of
5 the corrected amount of protein per serving in the form of a %DV, the
6 only information Plaintiff had about the Products was the 8 gram
7 protein quantity, and he did in fact believe he was receiving 8 grams of
8 high-quality protein when he purchased the Products.

- 9 e. Plaintiff continues to desire to purchase protein products, including
10 those marketed and sold by Defendant, and would like to purchase
11 products that provide 8 grams of protein per bag. If the Products that
12 currently make unlawful protein claims are reformulated to ensure they
13 provide, in a usable form, the grams of protein that are represented on
14 the labels, or their labels are changed to provide non-misleading
15 information, Plaintiff would likely purchase those Products again in the
16 future but will not do so until then. Plaintiff regularly visits stores
17 where the Products and other protein products are sold. Because
18 Plaintiff does not know the formula for Defendant's products, which can
19 change over time, and cannot test whether the Products provide the
20 amount of digestible protein that is represented on the label without
21 first purchasing the Product, Plaintiff will be unable to rely on
22 Defendant's labels when shopping for protein products in the future
23 absent an injunction that prohibits Defendant from mislabeling its
24 Products. Plaintiff would also be forced to retest and/or reanalyze each
25 Product that makes a protein claim but fails to include the %DV at each
26 time of purchase because such Products' ingredient list and labeling
27 would not reveal any changes in the amount of digestible protein, even if
28 such changes took place. In addition, at present Plaintiff cannot rely on

the accuracy of Defendant's labels for the entire line of Products, which Plaintiff is also interested in purchasing with labeling that comports with regulations. Should Defendant begin to market and sell a new line of products, Plaintiff could also be at risk for buying another one of Defendant's products in reliance on the same or similar misrepresentation and omissions. And because of Defendant's unlawful and misleading labels on its Products, Plaintiff cannot make informed choices between protein products offered by Defendant and protein products offered by other manufacturers, such as choices based on price and relative nutritional content.

f. Plaintiff and members of the Class have been economically damaged by their purchase of the Products because the advertising for the Products was and is untrue and/or misleading under state law and the products are misbranded; therefore, the Products are worth less than what Plaintiff and members of the Class paid for them and/or Plaintiff and members of the Class did not receive what they reasonably intended to receive.

10. Defendant is a Pennsylvania company with its principal place of business in Pipersville, Pennsylvania. Defendant produces, markets and distributes its consumer food products in retail stores across the United States including stores physically located in the State of California and in this district.

11. Whenever reference is made in this Complaint to any representation, act, omission, or transaction of a defendant, that allegation shall mean that the defendant did the act, omission, or transaction through its officers, directors, employees, agents, and/or representatives while they were acting within the actual or ostensible scope of their authority.

JURISDICTION AND VENUE

12. This Court has personal jurisdiction over Defendant. Defendant purposefully avails itself of the California consumer market and distributes the Products to many locations within this District and hundreds of retail locations throughout the State of California, where the Products are purchased by hundreds of consumers every day.

13. This Court has original subject-matter jurisdiction over this proposed class action pursuant to 28 U.S.C. § 1332(d), which, under the provisions of the Class Action Fairness Act (“CAFA”), explicitly provides for the original jurisdiction of the federal courts in any class action in which at least 100 members are in the proposed plaintiff class, any member of the plaintiff class is a citizen of a State different from any defendant, and the matter in controversy exceeds the sum of \$5,000,000.00, exclusive of interest and costs. Plaintiff alleges that the total claims of individual members of the proposed Class (as defined herein) are well in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs.

14. Venue is proper in this District under 28 U.S.C. § 1331(a). Plaintiff's purchases of Defendant's Products, substantial acts in furtherance of the alleged improper conduct, including the dissemination of false and misleading information regarding the nature, quality, and/or ingredients of the Products, occurred within this District and the Defendant conducts business in this District.

DIVISIONAL ASSIGNMENT

15. Pursuant to Civil Local Rule 3-2(c-d), a substantial part of the events giving rise to the claims arose in San Francisco County, and this action should be assigned to the San Francisco Division.

FACTUAL ALLEGATIONS

A. Defendant Manufactures, Labels, and Advertises the Product

16. Defendant manufactures, distributes, markets, advertises, and sells a variety of snack products under the brand name “BRADS PLANT BASED.” Many of these products have packaging that during the Class Period that predominately, uniformly, and consistently states on the principal display panel of the product labels that they contain and provide a certain amount of protein per bag.

17. The representations that the Products contain and provide a specific amount of protein per bag were uniformly communicated to Plaintiff and every other person who purchased any of the Products in the United States. The same or substantially similar product label has appeared on each Product during the Class Period in the general form of the following example:



1 18. The nutrition facts panel on the back of the Products uniformly and
 2 consistently failed to provide any statement of the corrected amount of protein per
 3 serving, expressed as a %DV, during the Class Period. The nutrition facts panels of
 4 the Products have appeared consistently during the Class Period in the general form
 5 of the following example (from the Crunchy Kale Naked flavor):

Nutrition Facts	
2 servings per container	
Serving size	1 oz (28g)
<hr/>	
Amount per serving	
Calories	90
<hr/>	
	% Daily Value*
Total Fat 6g	8%
Saturated Fat 1g	5%
Trans Fat 0g	
Cholesterol 0mg	0%
Sodium 200mg	9%
Total Carbohydrate 6g	2%
Dietary Fiber 2g	7%
Total Sugars 1g	
Includes 0g Added Sugars	0%
Protein 4g	
<hr/>	
Vitamin D 0mcg	0%
Calcium 47mg	4%
Iron 1mg	6%
Potassium 188mg	4%
Vitamin A 155mcg	15%
Vitamin C 50mg	60%
Vitamin K 178mcg	150%
<hr/>	
*The % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet.	

1 19. As described in detail below, Defendant's advertising and labeling of the
 2 Products as containing and providing specific amounts of protein per bag is unlawful,
 3 misleading, and intended to induce consumers to purchase the Products at a
 4 premium price, while ultimately failing to meet consumer expectations. The Products'
 5 front label protein claims are unlawful because Defendant did not: (1) calculate the
 6 "corrected amount of protein per serving" based on the quality of the product's protein
 7 using the PDCAAS method; and (2) provide a statement of that corrected amount of
 8 protein per serving in the NFP, expressed as a %DV. 21 C.F.R. § 101.9(c)(7)(i) & (iii).
 9 The unlawful front label protein claims induced consumers to purchase the Products
 10 at a premium price. Had Defendant complied with FDA regulations and not included
 11 a protein claim on the front label of its Products, reasonable consumers would not
 12 have purchased them or would have paid less for the Products.
 13

1 20. Defendant's failure to provide the required statement of the corrected
 2 amount of protein per serving, as well as Defendant's prominent front label protein
 3 claims made in the absence of any statement of the corrected amount of protein in the
 4 NFP, also deceived and misled reasonable consumers into believing that the Products
 5 will provide the grams of protein represented on the label, when that is not true. Had
 6 Defendant complied with the law, the statement of the corrected amount of protein
 7 would have revealed that the Products provide significantly less of the daily value of
 8 protein than high quality protein products with comparable protein quantities. The
 9 omission of this information allowed Defendant to charge a price premium. Had
 10 reasonable consumers been informed of the %DV for protein, as required by FDA
 11 regulations, they would not have purchased or would have paid less for the Products.

12 **B. Consumer Demand for Protein**

13 21. Consumers are focused on increasing the amount of protein in their
 14 diets. This increased demand indicates that consumers are willing to pay a premium
 15 for products labeled and marketed as containing high quality protein.³

16 22. Many American consumers are health conscious and seek wholesome,
 17 natural foods to keep a healthy diet, so they routinely rely upon nutrition information
 18 when selecting and purchasing food items. As noted by FDA Commissioner Margaret
 19 Hamburg during an October 2009 media briefing, “[s]tudies show that consumers
 20 trust and believe the nutrition facts information and that many consumers use it to
 21 help them build a healthy diet.” Indeed, the FDA recommends relying on Nutrition
 22 Facts Labels as the primary tool to monitor the consumption of protein.⁴

23
 24
 25 ³ See Brooks, Robert & Simpson, S.J. & Raubenheimer, David. (2010). *The price of*
protein: Combining evolutionary and economic analysis to understand excessive
energy consumption. Obesity Reviews : an official journal of the International
 26 Association for the Study of Obesity. 11. 887-94. 10.1111/j.1467-789X.2010.00733.x.

27
 28 ⁴ FDA Protein Fact Sheet,
<https://www.accessdata.fda.gov/scripts/InteractiveNutritionFactsLabel/factsheets/Protein.pdf>.

23. Protein is found throughout the body—in muscle, bone, skin, hair, and virtually every other body part or tissue. The health benefits of protein are well studied and wide ranging. Scientific studies have confirmed that protein can assist in weight loss, reduce blood pressure, reduce cholesterol, and control for risk factors for cardiovascular diseases. The National Academy of Medicine recommends that adults get a minimum of .8 grams of protein for every kilogram of body weight per day, or just over 7 grams for every 20 pounds of body weight.⁵ For a 140-pound person, that means about 50 grams of protein each day. For a 200-pound person, that means about 70 grams of protein each day.

24. The health benefits of protein are just as important, if not more important, for children. Children are in a relative state of constant growth and rely on protein as the building block of muscle, bone, skin, hair, and virtually every other body part or tissue. The National Academies of Science recommends the following amounts of daily intake of protein based on age group: 1-3 years old: 13g of protein per day; 4-8 years old: 19g of protein per day; 9-13 16 years old: 34g of protein per day.⁶

25. Protein quantity by itself does not tell the full story of protein from a human nutritional standpoint. A protein's quality is also critical because humans cannot fully digest or utilize some proteins. Proteins are not monolithic. They are simply chains of amino acids, and different types of amino acids chained together in different ways will make different types of proteins. Further, the makeup of the protein changes the function of that protein in the body, and certain types of proteins are more easily digested and used by humans than others.

26. All of a human's proteins are formed through the process of protein synthesis within their own bodies. That is, although humans consume dietary

⁵ National Academies of Medicine. Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients).

6 *Id.*

1 proteins, they digest those proteins, break them down into their constituent amino
2 acids, and then use those amino acids as building blocks to synthesize the human
3 proteins necessary for life, tissue repair, and other functions. Of the twenty total
4 amino acids, humans can produce only eleven of them on their own. Humans cannot
5 produce, under any circumstances, nine of the amino acids required for protein
6 synthesis. These nine amino acids are called the “essential amino acids” and they
7 must be supplied through the diet.

8 27. All nine essential amino acids are necessary for protein synthesis to take
9 place. Lacking even one essential amino acid will prevent protein synthesis from
10 occurring, and the rest of the proteins will degrade into waste. Accordingly, once the
11 body uses up the limiting essential amino acid from a protein source, the remainder
12 of that protein becomes useless to human protein synthesis and has little nutritional
13 value. As the FDA has explicitly recognized, “[b]ecause excess amino acids are not
14 stored in the body, humans need a constant supply of good quality dietary proteins to
15 support growth and development.” 58 Fed. Reg. 2079 at 2101. High-quality proteins,
16 therefore, are those that contain all nine essential amino acids because they have a
17 greater effect on protein synthesis and are fully digestible. A dietary protein
18 containing all of the essential amino acids in the correct proportions is typically called
19 a “complete protein.”

20 28. A protein source’s digestibility also affects the amount of useable protein
21 a person receives from consuming it. Plant-based proteins like oats are approximately
22 80% digestible, meaning 20% of the protein from that source will simply pass through
23 the body without ever being absorbed at all.

24 29. As the FDA has stated in official guidance, “Accurate methods for
25 determining protein quality are necessary because different food protein sources are
26 not equivalent in their ability to support growth and body protein maintenance.” 56
27 Fed. Reg. 60366, § B. The Protein Digestibility Corrected Amino Acid Score
28 (“PDCAAS”), is the FDA mandated measure of protein quality, and it accounts for

1 both the amino acid profile and the digestibility of the protein. 21 C.F.R. §
2 101.9(c)(7)(ii).

3 30. The PDCAAS method requires the manufacturer to determine the
4 amount of essential amino acids that the food contains and then combine that with
5 the proteins' digestibility into an overall discount factor (i.e., a "score" from 0.0-1.0)
6 that represents the actual amount of protein the food provides nutritionally when
7 multiplied by raw protein quantity. The regulations term this the "corrected amount
8 of protein per serving." 21 C.F.R. § 101.9(c)(7)(i).

9 31. Defendant uses plant-based proteins in its products. Because of the
10 differences in benefits depending on the amino acid composition of a protein, the
11 source of protein is important. Although some plants can be high quality protein
12 sources, most plant-based proteins do not contain all nine essential amino acids and
13 are low quality to humans. Kale, Sunflower Seed, and Chickpea proteins all have
14 PDCAAS scores of between .82. & .85, meaning approximately 15-18% of the protein
15 from those sources will be useless to humans nutritionally speaking.

16 32. Accordingly, Defendant's use of low-quality proteins in the Products
17 means that they actually provide far less protein to humans than the Product labels
18 claim.

19 **C. Defendant Violates Identical Federal and State Regulations**

20 **a. Federal and State Regulations are Identical**

21 33. The FDA oversees the regulation and labeling of food pursuant to the
22 Federal Food, Drug and Cosmetic Act ("FDCA").

23 34. California's Sherman Food, Drug and Cosmetic Law, Cal. Heath & Saf.
24 Code § 110765 et seq. (the "Sherman Law"), incorporates all food labeling regulations
25 promulgated by the FDA under the FDCA. *See e.g.*, Cal. Heath & Saf. Code §
26 110100(a) ("All food labeling regulations and any amendments to those regulations
27 adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or
28

1 after that date shall be the food labeling regulations of this state.”), § 110380 and §
 2 110505.

3 35. The federal laws and regulations discussed below are applicable
 4 nationwide to all sales of packaged food products. Additionally, none of the California
 5 laws sought to be enforced here imposes different requirements on the labeling of
 6 packaged food for sale in the United States.

7 36. To be clear, Plaintiff does not allege any claims pursuant to the FDCA
 8 and Sherman Law and relies on these regulations only to the extent they provide a
 9 predicate basis for liability under state and common law, as set forth herein.

10 **b. Regulations Governing the Labeling of Food Products**

11 37. 21 U.S.C. § 343 addresses misbranded food and states that a “food shall
 12 be deemed to be misbranded – (a) If (1) its labeling is false or misleading in any
 13 particular, or (2) in the case of a food to which section 350 of this title applies, its
 14 advertising is false or misleading in a material respect or its labeling is in violation of
 15 section 350(b)(2) of this title.” *See* 21 U.S.C. § 343(a).

16 38. Generally, a manufacturer is not required to include the DRV for
 17 protein. However, when a product’s label makes a nutrient content claim related to
 18 protein content, the manufacturer is required to include the DRV.⁷

19 **c. The Front Label Protein Claims Were Unlawful Due to the
 20 Omission of the %DV Inside the NFP as was the NFP Itself.**

21 39. A nutrient content claim is a claim that “expressly or implicitly
 22 characterizes the level of a nutrient.” 21 C.F.R. § 101.13(b). “Express” nutrient
 23 content claims include any statement outside the Nutrition Facts Panel, about the
 24 level of a nutrient. 21 C.F.R. 101.13(b)(1). Moreover, stating information from the
 25
 26

27 7 21 C.F.R. § 101.9(c)(7) and *see Guidance for Industry: A Food Labeling Guide*, U.S.
 28 FOOD & DRUG ADMINISTRATION, <https://www.fda.gov/files/food/published/Food-Labeling-Guide-%28PDF%29.pdf> at N22 (“The percent of the DRV is required if a protein claim is made for the product or if the product is represented or purported to be for use by infants or children under 4 years of age.”).

1 nutrition facts panel (such as grams protein per serving) elsewhere on the package
2 necessarily constitutes a nutrient content claim. 21 C.F.R. § 101.13(c).

3 40. The FDA has always considered nutrient content claims to be “a
4 marketing activity,” the purpose of which is to advertise a specific product as a
5 “significant source” of the relevant nutrient. 56 Fed. Reg. 60366, 60372, 60375. The
6 FDA has long been suspicious of nutrient content claims and has repeatedly stated
7 that such claims can be misleading, so the rules that govern them are far more
8 restrictive. Indeed, “the general rule is that ‘nutrient content claims’ are not
9 permitted on food labels” and must instead satisfy all of the requirements of § 101.13
10 before being authorized to appear at all.

11 41. FDA regulations specifically condition the ability to make a nutrient
12 content claim on compliance with the rules governing the NFP. Section 101.9(c)(7)(i),
13 in particular, sets forth special rules for the NFP when manufacturers make a
14 protein claim outside the NFP. It provides that “[a] statement of the corrected
15 amount of protein per serving, as determined in paragraph (c)(7)(ii) of this section,
16 calculated as a percentage of the RDI or DRV for protein, as appropriate, and
17 expressed as a Percent of Daily Value . . . shall be given if a protein claim is made for
18 the product . . .” 21 C.F.R. 101.9(c)(7)(i) (emphasis added). If a manufacturer does not
19 want to perform PDCAAS and provide a statement of the corrected amount of protein
20 per serving in the NFP, then it shall not make any protein claims.

21 42. The regulation governing nutrient content claims, section 101.13, also
22 makes this plain. Section 101.13(n) provides that “[n]utrition labeling in accordance
23 with § 101.9 . . . shall be provided for any food for which a nutrient content claim is
24 made” and § 101.13(b) states “a nutrient content claim[] may not be made on the label
25 . . . unless the claim is made in accordance with this regulation [i.e., § 101.13]” In
26 other words, a manufacturer may not make any protein nutrient content claims on
27 the front labels of their products unless they have complied with the requirements for
28 protein labeling in the nutrition facts panel pursuant to section 101.9(c)(7). Indeed,

1 the FDA made clear when promulgating § 101.13(n) that it means that a
2 manufacturer can only make “a nutrient content claim . . . on the label or in labeling
3 of a food, provided that the food bears nutrition labeling that complies with the
4 requirements in proposed § 101.9.” 58 Fed. Reg. 2302, 23310.

5 43. Further, FDA regulations require the %DV for protein to be calculated
6 using PDCAAS, a method that accounts for both protein quantity and protein quality.
7 21 C.F.R. § 101.9(c)(7)(i)-(iii); FDA Food Labeling Guide, p. 29, Question N.22.4 The
8 first step is to calculate the “corrected amount of protein per serving” by multiplying
9 protein quantity by the PDCAAS quality value, and then dividing that “corrected
10 amount” by 50 grams (the “recommended daily value” for protein) to come up with the
11 %DV. *Id.*

12 44. The Products, currently or during the Class Period, all made protein
13 claims on 14 the front label but failed to provide a statement of the corrected amount
14 of protein per serving in the NFP calculated according to the PDCAAS method. The
15 protein claims on the front are, therefore, unlawful, and were never permitted to be
16 on the labels in the first instance under §§ 17101.9(c)(7)(i), 101.13(n), and 101.13(b).

17 45. Defendant’s failure to include a statement of the corrected amount of
18 protein per serving expressed as a %DV in the NFP also renders the NFP itself
19 unlawful under §§ 101.9(c)(7)(i)-(iii).

20 46. Defendant’s Products are, therefore, unlawful, misbranded, and violate
21 the Sherman Law, California Health & Safety Code § 110660, et seq. Defendant,
22 currently and during the Class Period, made protein content claims on the front of its
23 Product packages even though it uniformly failed to provide a statement of the
24 corrected amount of protein per serving in the NFP calculated according to the
25 PDCAAS method and expressed as a %DV as required by 21 C.F.R. § 101.9(c)(7)(i).
26 Defendant’s failure to comply with this requirement render these front label protein
27 claims unlawful per se and the product misbranded pursuant to § 101.13(n) and (b),
28

1 as well as under § 101.9(c)(7)(i) itself. Defendant's NFPs are also unlawful and in
2 violation of § 101.9(c)(7)(i)-(iii).

3

4 **d. The Products' Labeling Violates Federal and State Regulations**

5 47. Defendant's marketing, advertising, and sale of the Products violates the
6 misbranding provisions of the Sherman Law (California Health & Safety Code §
7 110660, *et. seq.*), including but not limited to:

- 8 i. Section 110665 (a food is misbranded if its labeling does not
9 conform with the requirements for nutrition labeling as set forth
10 in 21 U.S.C. Sec. 11 343(q));
- 11 ii. Section 110705 (a food is misbranded if words, statements and
12 other information required by the Sherman Law to appear on food
13 labeling is either missing or not sufficiently conspicuous);
- 14 iii. Section 110760, which makes it unlawful for any person to
15 manufacture, sell, deliver, hold, or offer for sale any food that is
16 misbranded;
- 17 iv. Section 110765, which makes it unlawful for any person to
18 misbrand any food; and
- 19 v. Section 110770, which makes it unlawful for any person to receive
20 in commerce any food that is misbranded or to deliver or proffer
21 for delivery any such food.

22 48. Defendant's marketing, advertising, and sale of the Products also
23 violates the false advertising provisions of the Sherman Law (California Health &
24 Safety Code § 110390, *et. seq.*), including, but not limited to:

- 25 i. Section 110390, which makes it unlawful to disseminate false or
26 misleading food advertisements that include statements on
27 products and product packaging or labeling or any other medium

used to directly or indirectly induce the purchase of a food product;

- ii. Section 110395, which makes it unlawful to manufacture, sell, deliver, hold or offer to sell any falsely or misleadingly advertised food; and
 - iii. Sections 110398 and 110400, which make it unlawful to advertise misbranded food or to deliver or proffer for delivery any food that has been falsely or misleadingly advertised.

49. By failing to include on the Product labels the nutritional information required by law, Defendant has violated the Act and the standards set by FDA regulations, including but not limited to 21 C.F.R. § 101.9 (c)(7) and 21 C.F.R. §§ 101.13(i)(3), (b), (n), which have been incorporated by reference into the Sherman Law.

50. The aforementioned Sherman Law provisions stem from California’s traditional, historic police power to regulate food labels, which long predates the FDCA. *See Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894) (“If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which . . . it is the protection of the people against fraud and deception in the sale of food products”); *see also Brown v. Van’s Int’l Foods, Inc.*, No. 3:22-cv-00001-WHO, 2022 WL 1471454, at *7 (N.D. Cal. May 10, 2022) (“[s]tates have traditionally possessed the power to protect their citizens from fraud and deception in the sale of food, and therefore there is a strong presumption against federal preemption in the area of marketing food”), quoting *Clancy v. Bromley Tea Co.*, 308 F.R.D. 564, 573 (N.D. Cal. 2013).

51. Moreover, while the Sherman Law directly incorporates the FDA food labeling regulations in Section 110665, Plaintiff bases his claims on other Sherman Law provisions that independently prohibit the dissemination of “false or misleading food advertisements” (which include food labels) and the misbranding of food,

1 including Sections 110705, 110760, 110765, 110390, 11039, 110398. These provisions,
2 in particular, would exist even if the FDCA did not.

3

4 **e. The Omission of the %DV Was Misleading Under Traditional
5 State Law Prohibitions Against Fraudulent and Deceptive
6 Advertising.**

7 52. In addition to violating the aforementioned statutes, Defendant has
8 violated the traditional common law duty not to commit fraud and mislead consumers
9 about the characteristics and qualities of its Products, as well as traditional state law
10 prohibitions on false and misleading advertising that long predate the FDCA or
Sherman Law.

11 53. Defendant's use of a front-label protein claim, while failing to include
12 the required statement of the corrected amount of protein per serving in the NFP
13 calculated using the PDCAAS method and expressed as a %DV, is misleading.
14 Reasonable consumers are unaware of the nutritional value of various protein sources
15 and upon seeing a front-label quantitative protein claim reasonably believe that all of
16 the advertised protein will be nutritionally available—i.e., that the product contains
17 high quality proteins. Had Defendant complied with the law, the statement of the
18 corrected amount of protein expressed as a %DV would have revealed that the
19 Products provide significantly less of the daily value of protein than high quality
20 protein products with comparable protein quantities. Had reasonable consumers been
21 informed of the %DV for protein, as required by FDA regulations, they would not
22 have purchased or would have paid less for the Products.

23 54. Consumers lack the meaningful ability to test or independently
24 ascertain the truthfulness of Defendant's food labeling claims, especially at the point
25 of sale. They would not know the quality of protein in the Products or how much of
26 the daily recommended value of protein they provide merely by looking elsewhere on
27 the product package given Defendant's omissions. Its discovery requires investigation
28 well beyond the grocery store aisle and knowledge of food chemistry beyond that of

the average consumer. An average consumer does not have the specialized knowledge necessary to ascertain the nutritional value of the protein in the Products. The average reasonable consumer had no reason to suspect that Defendant's representations and omissions on the packages were misleading.

55. Defendant intends and knows that consumers will and do rely upon food labeling statements in making their purchasing decisions. Label claims and other forms of advertising and marketing drive product sales, particularly if placed prominently on the front of product packaging, as Defendant has done with its protein claims.

56. Defendant's duty not to mislead consumers about the quality or nutritional value of the protein in its products does not stem from either the FDCA or California's Sherman Law. Instead, that duty stems from traditional California prohibitions on misleading and deceptive advertising (including prohibitions on fraudulent omissions) that long predate the FDCA or Sherman Law, including the UCL's fraud prong, the CLRA, the FAL, and the common law tort of fraud.

f. Defendant Misleadingly Markets the Products to Increase Profits and Gain a Competitive Edge

57. In making unlawful, false, misleading, and deceptive representations, Defendant distinguishes the Products from its competitors' products. Defendant knew and intended that consumers would purchase, and pay a premium for, products labeled with protein claims and that failed to reveal they provide less of the daily value of protein than comparable products with high quality proteins. By using this branding and marketing strategy, Defendant is stating that the Products are superior to, better than, and more nutritious and healthful than other products that do not make protein claims, or that do not make protein claims based on poorly- disclosed added ingredients, or that properly provide the required statement of the corrected amount of protein in the product as determined by the PDCAAS method and

1 expressed as a %DV and otherwise do not mislead consumers about the quality or
2 nutritional value of the protein in their products.

3

4 **g. Defendant Intends to Continue to Market the Products with**
5 **Protein Claims**

6 58. Because consumers pay a price premium for products that make protein
7 claims, and also pay a premium for products that provide more protein, by labeling its
8 Products with protein claims and/or omitting the required statement of the corrected
9 amount of protein per serving, Defendant is able to both increase its sales and retain
10 more profits.

11 59. Defendant engaged in the practices complained of herein to further its
12 private interests of: (i) increasing sales of the Products while decreasing the sales of
13 competitors that do not misrepresent the number of grams of protein contained in its
14 products, and/or (ii) commanding a higher price for its Products because consumers
15 will pay more for the Products due to consumers' demand for products with protein
16 claims.

17 60. The market for protein products is continuing to grow and expand, and
18 because Defendant knows consumers rely on representations about the number of
19 grams of protein in food products, Defendant has an incentive to continue to make
20 such unlawful and misleading representations. In addition, other trends suggest that
21 Defendant has no incentive to change its labeling practices.

22 61. For example, one market analysis revealed that between 2013-2017,
23 product launches with a protein claim grew 31%.⁸

24 62. To capitalize on the growing market, Defendant continues to launch new
25 product lines and flavors to diversify its portfolio to maintain its competitive edge.
26 Moreover, Defendant has continued to replicate its misrepresentations on new
27

28 ⁸ Gil Hyslop, *10 Key Snack Trends to Watch*, BAKERYANDSNACKS.COM (Sep. 28, 2021),
<https://www.bakeryandsnacks.com/Article/2018/11/26/10-key-snack-trends-to-watch>.

1 products. It is therefore likely that Defendant will continue to unlawfully and/or
2 misleadingly advertise the Products and perpetuate the misrepresentations regarding
3 the protein in the Products.

4

5 **C. Plaintiff and Consumers Purchased the Products to Their**
Detriment

6 63. Plaintiff and the Class Members reasonably relied to their detriment on
7 Defendant's misleading representations and omissions.

8 64. Defendant's false, misleading, and deceptive misrepresentations and
9 omissions are likely to continue to deceive and mislead reasonable consumers and the
10 general public, as they have already deceived and misled the Plaintiff and the Class
11 Members.

12 65. In making unlawful, false, misleading, and deceptive representations,
13 Defendant distinguishes the Products from its competitors' products. Defendant knew
14 and intended that consumers would purchase, and pay a premium for, products
15 labeled with protein claims and that failed to reveal they provide less of the daily
16 value of protein than comparable products with high quality proteins. By using this
17 branding and marketing strategy, Defendant is stating that the Products are superior
18 to, better than, and more nutritious and healthful than other products that do not
19 make protein claims, or that do not make protein claims based on poorly-disclosed
20 added ingredients, or that properly provide the required statement of the corrected
21 amount of protein in the product as determined by the PDCAAS method and
22 expressed as a %DV and otherwise do not mislead consumers about the quality or
23 nutritional value of the protein in their Products.

24 66. As an immediate, direct, and proximate result of Defendant's false,
25 misleading, and deceptive representations and omissions, Defendant injured the
26 Plaintiff and the Class Members in that they:

- 27 a. Paid a sum of money for Products that were not what Defendant
28 represented;

- 1 b. Paid a premium price for Products that were not what Defendant
2 represented;
3 c. Were deprived of the benefit of the bargain because the Products they
4 purchased were different from what Defendant warranted; and
5 d. Were deprived of the benefit of the bargain because the Products they
6 purchased had less value than what Defendant represented.

7 67. Had Defendant not made the false, misleading, and deceptive
8 representations and omissions, Plaintiff and the Class Members would not have been
9 willing to pay the same amount for the Products they purchased, and, consequently,
10 Plaintiff and the Class Members would not have been willing to purchase the
11 Products.

12 68. Plaintiff and the Class Members paid for Products that were represented
13 to have certain levels of protein but received Products that were deficient. The
14 products Plaintiff and the Class Members received were worth less than the Products
15 for which they paid.

16 69. Based on Defendant's misleading and deceptive representations,
17 Defendant was able to, and did, charge a premium price for the Products over the cost
18 of competitive products that do not misrepresent the protein levels and are compliant
19 with the law.

20 70. Plaintiff and the Class Members all paid money for the Products.
21 However, Plaintiff and the Class Members did not obtain the full value of the
22 advertised Products due to Defendant's misrepresentations and omissions. Plaintiff
23 and the Class Members purchased, purchased more of, and/or paid more for, the
24 Products than they would have had they known the truth about the Products.
25 Consequently, Plaintiff and the Class Members have suffered injury in fact and lost
26 money as a result of Defendant's wrongful conduct.

1 CLASS DEFINITIONS AND ALLEGATIONS

2 71. Plaintiff brings this action as a class action pursuant to Federal Rule of
3 Civil Procedure 23 on behalf of himself, on behalf of all others similarly situated, and
4 as a member of the classes defined as follows (collectively, the “Class” or “Classes”):

- 5 1. All citizens of California who, within the relevant statute of
6 limitation periods, purchased Defendant’s Products (“California
7 Class”);
8 2. All citizens of the United States who, within the relevant statute
9 of limitations periods, purchased Defendant’s Products
10 (“Nationwide Class”).

11 72. Excluded from the Class are Defendant, its parents, subsidiaries,
12 affiliates, officers, and directors, those who purchased the Products for resale, all
13 persons who make a timely election to be excluded from the Class, the judge to whom
14 the case is assigned and any immediate family members thereof, and those who
15 assert claims for personal injury.

16 73. The members of the Class are so numerous that joinder of all Class
17 Members is impracticable. Defendant has sold, at a minimum, tens of thousands of
18 units of the Products to Class Members.

19 74. There is a well-defined community of interest in the questions of law and
20 fact involved in this case. Questions of law and fact common to the members of the
21 putative classes that predominate over questions that may affect individual Class
22 Members include, but are not limited to the following:

- 23 a. What is the PDCAAS for the protein in the Products;
24 b. Whether the marketing, advertising, packaging, labeling, and other
25 promotional materials for the Products are unlawful and/or misleading;
26 c. Whether Defendant’s actions violate Federal and California laws
27 invoked herein;

- 1 d. Whether labeling the Products with a protein claim causes the Products
2 to command a price premium in the market;
- 3 e. Whether Defendant's failure to provide a statement of the corrected
4 amount of protein per serving in the Products sold to the Classes was
5 likely to deceive reasonable consumers;
- 6 f. Whether representations regarding the number of grams of protein in
7 the Products are material to a reasonable consumer;
- 8 g. Whether Defendant engaged in the behavior knowingly, recklessly, or
9 negligently;
- 10 h. The amount of profits and revenues Defendant earned as a result of the
11 conduct;
- 12 i. Whether Class members are entitled to restitution, injunctive and other
13 equitable relief and, if so, what is the nature (and amount) of such relief;
14 and
- 15 j. Whether Class members are entitled to payment of actual, incidental,
16 consequential, exemplary and/or statutory damages plus interest
17 thereon, and if so, what is the nature of such relief.

18 75. Plaintiff's claims are typical of those of other Class Members because
19 Plaintiff, like all members of the Classes, purchased Defendant's Products bearing
20 the same representations and omissions and Plaintiff sustained damages from
21 Defendant's wrongful conduct.

22 76. Plaintiff will fairly and adequately protect the interests of the classes
23 and has retained counsel that is experienced in litigating complex class actions.
24 Plaintiff has no interests which conflict with those of the classes.

25 77. A class action is superior to any other available means for the fair and
26 efficient adjudication of this controversy, and no unusual difficulties are likely to be
27 encountered in the management of this class action. The damages or other financial
28 detriment suffered by Plaintiff and the other Class Members are relatively small

compared to the burden and expense that would be required to individually litigate their claims against Defendant, making it impracticable for Class Members to individually seek redress for Defendant's wrongful conduct. Even if Class Members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court.

78. The prerequisites to maintaining a class action for equitable relief are met as Defendant has acted or refused to act on grounds generally applicable to the classes, thereby making appropriate equitable relief with respect to the classes as a whole.

79. The prosecution of separate actions by members of the classes would create a risk of establishing inconsistent rulings and/or incompatible standards of conduct for Defendant. For example, one court might enjoin Defendant from performing the challenged acts, whereas another might not. Additionally, individual actions could be dispositive of the interests of the classes even where certain Class Members are not parties to such actions.

FIRST CLAIM FOR RELIEF

Violations of the Unfair Competition Law (“UCL”),

Cal. Bus. & Prof. Code §§ 17200 *et seq.*

80. Plaintiff repeats and realleges each and every factual allegation contained in the foregoing paragraphs as if fully set forth herein.

81. Plaintiff brings this claim individually and on behalf of the members of the proposed California Class against the Defendant.

82. Within four (4) years preceding the filing of this lawsuit, and at all times mentioned herein, Defendant has engaged, and continue to engage, in unlawful,

1 unfair, and fraudulent trade practices in California by engaging in the unlawful,
2 unfair, and fraudulent business practices outlined in this complaint.

3 83. In particular, Defendant has engaged, and continues to engage, in
4 unlawful practices by, without limitation, violating the following state and federal
5 laws: (i) the CLRA as described herein; (ii) the FAL as described herein; (iii) the
6 advertising provisions of the Sherman Law (Article 3), including without limitation,
7 California Health & Safety Code §§ 110390, 110395, 110398 and 110400; (iv) the
8 misbranded food provisions of the Sherman Law (Article 6), including without
9 limitation, California Health & Safety Code §§ 110660, 110665, 110705, 110760,
10 110765, and 110770; and (v) and federal laws regulating the advertising and
11 branding of food in 21 U.S.C. § 343(a), et seq. and FDA regulations, including but not
12 limited to 21 C.F.R. § 101.9 (c)(7), which are incorporated into the Sherman Law
13 (California Health & Safety Code §§ 110100(a), 110380, and 110505).

14 84. In particular, Defendant has engaged, and continues to engage, in unfair
15 and fraudulent practices by, without limitation, the following: (i) unlawfully making a
16 protein claim on the front of the package without complying with the regulatory
17 requirements for making a protein claim set forth in 21 C.F.R. § 101.9(c)(7)(i)-(iii) and
18 incorporated by reference by California's Sherman law; (ii) failing to provide a
19 statement of the corrected amount of protein per serving in the NFP, calculated
20 according to the PDCAAS method and expressed as a %DV, as required by FDA
21 regulations; and (iii) misleading reasonable consumers regarding the quality of
22 protein in their products and its contribution to consumers' daily protein needs by
23 omitting the %DV for protein.

24 85. Plaintiff and those similarly situated relied to their detriment on
25 Defendant's unlawful, unfair, and fraudulent business practices. Had Plaintiff and
26 those similarly situated been adequately informed and not deceived by Defendant,
27 they would have acted differently by, without limitation: (i) declining to purchase the
28 Products, (ii) purchasing less of the Products, or (iii) paying less for the Products.

1 86. Defendant's acts and omissions are likely to deceive the general public.

2 87. Defendant engaged in these deceptive and unlawful practices to increase
3 its profits. Accordingly, Defendant has engaged in unlawful and fraudulent trade
4 practices, as defined and prohibited by section 17200, *et seq.* of the California
5 Business and Professions Code.

6 88. The aforementioned practices, which Defendant has used to its
7 significant financial gain, also constitute unlawful competition and provide an
8 unlawful advantage over Defendant's competitors as well as injury to the general
9 public.

10 89. As a direct and proximate result of such actions, Plaintiff and the other
11 Class Members have suffered and continue to suffer injury in fact and have lost
12 money and/or property as a result of such deceptive and/or unlawful trade practices
13 and unfair competition in an amount which will be proven at trial, but which is in
14 excess of the jurisdictional minimum of this Court. Among other things, Plaintiff and
15 the Class members lost the amount they paid for the Products.

16 90. As a direct and proximate result of such actions, Defendant has enjoyed,
17 and continues to enjoy, significant financial gain in an amount which will be proven
18 at trial, but which is in excess of the jurisdictional minimum of this Court.

19 91. Plaintiff seeks, on behalf of himself and those similarly situated,
20 equitable relief, including the restitution for the premium and/or full price that they
21 or others paid to Defendant as a result of Defendant's conduct. Plaintiff and the Class
22 lack an adequate remedy at law to obtain such relief with respect to their
23 "unlawfulness" claims in this UCL cause of action because the California Sherman
24 Law does not provide a direct cause of action, so Plaintiff and the Class must allege
25 those violations as predicate acts under the UCL to obtain relief.

26 92. Plaintiff also seeks equitable relief, including restitution, with respect to
27 his UCL "fraudulent" prong claims. Pursuant to Federal Rule of Civil Procedure
28 8(e)(2), Plaintiff makes the following allegations in this paragraph only hypothetically

1 and as an alternative to any contrary allegations in their other causes of action, in
2 the event that such causes of action do not succeed. Plaintiff and the Class may be
3 unable to obtain monetary, declaratory and/or injunctive relief directly under other
4 causes of action and will lack an adequate remedy of law, if the Court requires them
5 to show class-wide reliance and materiality beyond the objective reasonable consumer
6 standard applied under the UCL, because Plaintiff may not be able to establish each
7 Class Member's individualized understanding of Defendant's misleading
8 representations as described in this Complaint, but the UCL does not require
9 individualized proof of deception or injury by absent class members. *See, e.g., Stearns*
10 *v Ticketmaster*, 655 F.3d 1013, 1020, 1023-25 (distinguishing, for purposes of CLRA
11 claim, among class members for whom website representations may have been
12 materially deficient, but requiring certification of UCL claim for entire class). In
13 addition, Plaintiff and the Class may be unable to obtain such relief under other
14 causes of action and will lack an adequate remedy at law, if Plaintiff is unable to
15 demonstrate the requisite *mens rea* (intent, reckless, and/or negligence), because the
16 UCL imposes no such *mens rea* requirement and liability exists even if Defendant
17 acted in good faith.

18 93. Plaintiff seeks, on behalf of those similarly situated, a declaration that
19 the above-described trade practices are fraudulent, unfair, and/or unlawful.

20 94. Plaintiff seeks, on behalf of those similarly situated, an injunction to
21 prohibit Defendant from continuing to engage in the deceptive and/or unlawful trade
22 practices complained of herein. Such misconduct by Defendant, unless and until
23 enjoined and restrained by order of this Court, will continue to cause injury in fact to
24 the general public and the loss of money and property in that Defendant will continue
25 to violate the laws of California, unless specifically ordered to comply with the same.
26 This expectation of future violations will require current and future consumers to
27 repeatedly and continuously seek legal redress in order to recover monies paid to
28 Defendant to which they were not entitled. Plaintiff and those similarly situated have

1 no other adequate remedy at law to ensure future compliance with the California
2 Business and Professions Code alleged to have been violated herein.

3 95. Defendant's conduct constitutes an unfair business act and practice
4 pursuant to California Business & Professions Code §§ 17200, *et seq.* (the "UCL"). The
5 UCL provides, in pertinent part: "Unfair competition shall mean and include
6 unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or
7 misleading advertising"

8 96. Defendant's knowing conduct, as alleged herein, constitutes an "unfair"
9 and/or "fraudulent" business practice, as set forth in California Business &
10 Professions Code §§ 17200-17208.

11 97. Defendant's conduct was and continues to be unfair and fraudulent
12 because, directly or through its agents and employees, Defendant made materially
13 false representations and omissions.

14 98. Defendant is aware that the representations and omissions they have
15 made about the Products were and continue to be false and misleading.

16 99. Defendant had an improper motive—to derive financial gain at the
17 expense of accuracy or truthfulness—in its practices related to the labeling and
18 advertising of the Products.

19 100. There were reasonable alternatives available to Defendant to further its
20 legitimate business interests, other than the conduct described herein.

21 101. Defendant's misrepresentations of material facts, as set forth herein,
22 also constitute an "unlawful" practice because they violate California Civil Code §§
23 1572, 1573, 1709, 1710, 1711, and 1770 and the laws and regulations cited herein, as
24 well as the common law.

25 102. Defendant's conduct in making the representations and omissions
26 described herein constitutes a knowing failure to adopt policies in accordance with
27 and adherence to applicable laws, as set forth herein, all of which are binding upon
28 and burdensome to their competitors. This conduct creates an unfair competitive

advantage for Defendant, thereby constituting an unfair business practice under California Business & Professions Code §§ 17200-17208.

103. In addition, Defendant's conduct was, and continues to be, unfair in that its injury to countless purchasers of the Products is substantial, and is not outweighed by any countervailing benefits to consumers or to competitors.

104. Moreover, Plaintiff and members of the California Class could not have reasonably avoided such injury. Defendant's material misrepresentations and omissions regarding the Products were likely to deceive, and Defendant knew or should have known that its misrepresentations and omissions were untrue and misleading. Plaintiff purchased the Products in reliance on the representations made by Defendant, including that the Products' labeling was accurate as alleged herein, and without knowledge of Defendant's misrepresentations and omissions.

SECOND CLAIM FOR RELIEF

Violations of the False Advertising Law (“FAL”),

Cal. Bus. & Prof. Code §§ 17500 *et seq.*

105. Plaintiff repeats and realleges each and every factual allegation contained in the foregoing paragraphs as if fully set forth herein.

106. Plaintiff brings this claim individually and on behalf of the members of
the proposed California Class against the Defendant.

107. Beginning at an exact date unknown to Plaintiff, but within four (4) years preceding the filing of the Class Action Complaint, Defendant made untrue, false, deceptive and/or misleading statements in connection with the advertising and marketing of the Products.

108. Defendant made representations and statements (by omission and commission) that led reasonable customers to believe that the Products that they were purchasing contained high quality proteins that provided nutritionally more grams of protein per bag than the Products actually provided, and that the Products

1 were appropriate for meeting protein dietary needs. Defendant had a duty to disclose
2 the corrected amount of protein per serving in the NFP, as calculated according to the
3 PDCAAS method, which Defendant failed to do.

4 109. Plaintiff and those similarly situated relied to their detriment on
5 Defendant's false, misleading and deceptive advertising and marketing practices,
6 including each of the misrepresentations and omissions set forth above. Had Plaintiff
7 and those similarly situated been adequately informed and not intentionally deceived
8 by Defendant, they would have acted differently by, without limitation, refraining
9 from purchasing Defendant's Products or paying less for them.

10 110. Defendant's acts and omissions are likely to deceive the general public.

11 111. Defendant engaged in these false, misleading and deceptive advertising
12 and marketing practices to increase its profits. Accordingly, Defendant has engaged
13 in false advertising, as defined and prohibited by section 17500, *et seq.* of the
14 California Business and Professions Code.

15 112. The aforementioned practices, which Defendant used, and continues to
16 use, to its significant financial gain, also constitute unlawful competition and provide
17 an unlawful advantage over Defendant's competitors as well as injury to the general
18 public.

19 113. As a direct and proximate result of such actions, Plaintiff and the other
20 members have suffered, and continue to suffer, injury in fact and have lost money
21 and/or property as a result of such false, deceptive and misleading advertising in an
22 amount which will be proven at trial, but which is in excess of the jurisdictional
23 minimum of this Court.

24 114. Plaintiff seeks, on behalf of himself and those similarly situated, full
25 restitution of monies, as necessary and according to proof, to restore any and all
26 monies acquired by Defendant from Plaintiff, the general public, or those similarly
27 situated by means of the false, misleading and deceptive advertising and marketing
28 practices complained of herein, plus 16interest thereon. Pursuant to Federal Rule of

1 Civil Procedure 8(e)(2), Plaintiff makes the following allegations in this paragraph
2 only hypothetically and as an alternative to any contrary allegations in his other
3 causes of action, in the event that such causes of action will not succeed. Plaintiff and
4 the Class may be unable to obtain monetary, declaratory and/or injunctive relief
5 directly under other causes of action and will lack an adequate remedy at law, if the
6 Court requires them to show class-wide reliance and materiality beyond the objective
7 reasonable consumer standard applied under the FAL, because Plaintiff may not be
8 able to establish each Class member's individualized understanding of Defendant's
9 misleading representations as described in this Complaint, but the FAL does not
10 require individualize proof of deception or injury by absent Class members. *See, e.g.*,
11 *Ries v. Ariz. Bevs. USA LLC*, 26 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("restitutionary
12 relief under the UCL and FAL 'is available without individualized proof of deception,
13 reliance, and injury.'"). In addition, Plaintiff and the Class may be unable to obtain
14 such relief under other causes of action and will lack an adequate remedy at law, if
15 Plaintiff is unable to demonstrate the requisite *mens rea* (intent, reckless, and/or
16 negligence), because the FAL imposes no such *mens rea* requirement and liability
17 exists even if Defendant acted in good faith.

18 115. Plaintiff seeks, on behalf of himself and those similarly situated, a
19 declaration that the above-described practices constitute false, misleading and
20 deceptive advertising.

21 116. Plaintiff seeks, on behalf of himself and those similarly situated, an
22 injunction to prohibit Defendant from continuing to engage in the false, misleading
23 and deceptive advertising and marketing practices complained of herein. Such
24 misconduct by Defendant, unless and until enjoined and restrained by order of this
25 Court, will continue to cause injury in fact to the general public and the loss of money
26 and property in that Defendant will continue to violate the laws of California, unless
27 specifically ordered to comply with the same. This expectation of future violations will
28 require current and future consumers to repeatedly and continuously seek legal

1 redress in order to recover monies paid to Defendant to which it is not entitled.
2 Plaintiff, those similarly situated, and/or other consumers nationwide have no other
3 adequate remedy at law to ensure future compliance with the California Business
4 and Professions Code alleged to have been violated herein.

5

6 **THIRD CLAIM FOR RELIEF**

7 **Violations of the Consumer Legal Remedies Act (“CLRA”),**
8 **Cal. Civ. Code §§ 1750 *et seq.***

9 117. Plaintiff repeats and realleges each and every factual allegation
10 contained in the foregoing paragraphs as if fully set forth herein.

11 118. Plaintiff brings this claim individually and on behalf of the members of
12 the proposed California Class against the Defendant.

13 119. At all times relevant hereto, Plaintiff and members of the California
14 Class were “consumer[s],” as defined in Civil Code section 1761(d).

15 120. At all times relevant hereto, Defendant constituted a “person,” as
16 defined in Civil Code section 1761(c).

17 121. At all times relevant hereto, the Products manufactured, marketed,
18 advertised, and sold by Defendant constituted “goods,” as defined in Civil Code
19 section 1761(a).

20 122. The purchases of the Products by Plaintiff and members of the
21 California Class are “transactions” within the meaning of Civil Code section 1761(e).

22 123. Defendant’s acts, practices, and omissions, set forth in this Complaint,
23 led customers to falsely believe that the Products contained high quality proteins that
24 provided nutritionally the full amount of protein advertised on the product package.
25 By engaging in the actions, representations and conduct set forth in this Complaint,
26 Defendant has violated, and continues to violate, § 1770(a)(2), § 1770(a)(5), §
27 1770(a)(7), § 1770(a)(8), and § 1770(a)(9) of the CLRA. In violation of California Civil
28 Code §1770(a)(2), Defendant’s acts and practices constitute improper representations

1 regarding the source, sponsorship, approval, or certification of the goods they sold. In
2 violation of California Civil Code §1770(a)(5), Defendant's acts and practices
3 constitute improper representations that the goods it sells have sponsorship,
4 approval, characteristics, ingredients, uses, benefits, or quantities, which they do not
5 have. In violation of California Civil Code § 1770(a)(7), Defendant's acts, practices,
6 and omissions constitute improper representations that the goods it sells are of a
7 particular standard, quality, or grade, when they are of another. In violation of
8 California Civil Code §1770(a)(8),

9 124. Defendant deceptively markets and advertises that, unlike other protein
10 product manufacturers, it sells Products that provide nutritionally more grams of
11 protein than the Products actually do. In violation of California Civil Code
12 §1770(a)(9), Defendant has advertised goods or services with intent not to sell them
13 as advertised.

14 125. Pursuant to the provisions of Cal. Civ. Code § 1782(a), Plaintiff provided
15 notice to Defendant of its alleged violations of the CLRA, demanding that Defendant
16 correct such violations, and providing it with the opportunity to correct its business
17 practices. Notice was sent via certified mail, return receipt requested on January 17,
18 2023. As of the date of filing this complaint, Defendant has not responded.
19 Accordingly, if after 30 days no satisfactory response to resolve this litigation on a
20 class-wide basis has been received, Plaintiff will seek leave to amend this request to
21 seek restitution and actual damages as provided by the CLRA.

22 126. Pursuant to California Civil Code § 1780, Plaintiff seeks injunctive
23 relief, reasonable attorneys' fees and costs, and any other relief that the Court deems
24 proper.

127. Defendant knew or should have known that its Products did not contain the claimed characteristics because Defendant manufactured, marketed and sold its Products without those characteristics that it claimed. Defendant knew or should have known that its representations about its products as described herein violated consumer protection laws, and that these statements would be relied upon by Plaintiff and members of the California Class.

128. Defendant's actions as described herein were done with conscious disregard of Plaintiff's and California Class Members' rights and was wanton and malicious.

129. Defendant's wrongful business practices constituted, and constitute, a continuing course of conduct in violation of the CLRA because Defendant still represents that its Products have characteristics which they do not have.

FOURTH CLAIM FOR RELIEF

Violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law,

73 Pa. Cons. Stat. §§ 201-2 and 201-3, *et seq.*

130. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

131. Plaintiff brings this claim individually and on behalf of the members of
the proposed Nationwide Class against the Defendant.

^{132.} Defendant is a "person," as meant by 73 Pa. Cons. Stat. § 201-2(2).

133. Plaintiff and Class Members purchased goods and services in “trade” and “commerce,” as meant by 73 Pa. Cons. Stat. § 201-2(3), primarily for personal, family, and/or household purposes.

1 134. Defendant engaged in unfair methods of competition and unfair or
2 deceptive acts or practices in the conduct of its trade and commerce in violation of 73
3 Pa. Cons. Stat. § 201-3, including the following: representing that its goods and
4 services have characteristics, uses, benefits, and qualities they do not have (73 Pa.
5 Cons. Stat. § 201-2(4)(v)); representing that its goods and services are of a particular
6 standard or quality if they are another (73 Pa. Cons. Stat. § 201-2(v)(vii)); and
7 advertising its goods and services with intent not to sell them as advertised (73 Pa.
8 Cons. Stat. § 201-2(4)(ix)); and engaging in any other fraudulent or deceptive conduct
9 which creates a likelihood of confusion or of misunderstanding (73 Pa. Cons. Stat. §
10 201-2(v)(xxi)).

135. As alleged more fully above, Defendant through its misrepresentations
13 and omissions has violated the Unfair Trade Practices and Consumer Protection Law
14 by misleadingly, deceptively, and falsely representing to Plaintiff and the other
15 members of the Nationwide Class that the Products contain specific amounts of
16 protein when in fact they do not contain the full nutritional quality of protein.

136. Defendant's representations and omissions were material because they
19 were likely to deceive reasonable consumers.

137. As a direct and proximate result of Defendant's deceptive acts and
21 practices, Plaintiff and the Class have suffered and will continue to suffer injury,
22 ascertainable losses of money or property, and monetary and non-monetary damages,
23 including from not receiving the benefit of their bargain in purchasing the Products.

138. Plaintiff and other members of the Class lost money or property as a
25 result of Defendant's violations because: (a) they would not have purchased the
27 Products on the same terms if they knew that the Products did not contain the

represented protein levels; (b) they paid a substantial price premium compared to other food products due to Defendant's misrepresentations and omissions; and (c) the Products do not have the characteristics, uses, or benefits as promised.

139. Plaintiff and the Nationwide Class seek all monetary and non-monetary relief allowed by law, including actual damages or statutory damages of \$100 (whichever is greater), treble damages, attorneys' fees and costs, and any additional relief this Court deems necessary or proper.

FIFTH CLAIM FOR RELIEF

Unjust Enrichment

140. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

141. Plaintiff brings this claim individually and on behalf of the members of the proposed Classes against the Defendant.

142. At all times relevant hereto, Defendant deceptively marketed, advertised, and sold merchandise to Plaintiff and the Classes.

143. Plaintiff and members of the Classes conferred upon Defendant nongratiuitous payments for the Products that they would not have if not for Defendant's deceptive advertising and marketing. Defendant accepted or retained the nongratiuitous benefits conferred by Plaintiff and members of the Classes, with full knowledge and awareness that, as a result of Defendant's deception, Plaintiff and members of the Classes were not receiving a product of the quality, nature, fitness, or value that had been represented by Defendant and reasonable consumers would have expected.

144. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiff's and Class Members' purchases of the Products. Retention of those monies under these circumstances is unjust and inequitable because of Defendant's misrepresentations about the Products, which caused injuries to Plaintiff and Class Members because they would not have purchased the Products if the true facts had been known.

145. Because Defendant's retention of the non-gratuitous benefits conferred on it by Plaintiff and members of the Classes is unjust and inequitable, Defendant must pay restitution to Plaintiff and members of the Classes for its unjust enrichment, as ordered by the Court.

RELIEF DEMANDED

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendant, as follows:

- a. Certification of the proposed Classes, including appointment of Plaintiff's counsel as class counsel;
 - b. An order temporarily and permanently enjoining Defendant from continuing the unlawful, deceptive, fraudulent, and unfair business practices alleged in this Complaint;
 - c. An award of compensatory damages in an amount to be determined at trial, except for those causes of action where compensatory damages are not legally available;
 - d. An award of statutory damages in an amount to be determined at trial, except for those causes of action where statutory damages are not legally available;

- 1 e. An award of punitive damages in an amount to be
2 determined at trial, except for those causes of action
3 where punitive damages are not legally available;
4 f. An award of treble damages, except for those causes
5 of action where treble damages are not legally
6 available;
7 g. An award of restitution in an amount to be
8 determined at trial;
9 h. An order requiring Defendant to pay both pre- and
10 post-judgment interest on any amounts awarded;
11 i. For reasonable attorneys' fees and the costs of suit
12 incurred; and
13 j. For such further relief as this Court may deem just
14 and proper.

15
16 **JURY DEMAND**

17 Plaintiff demands a trial by jury on all causes of action and issues so triable.
18

19 Dated: January 25, 2023

20 Respectfully submitted,

21 By: /s/ *J. Ryan Gustafson*

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7 **pro hac vice* to be sought
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